MEDICAL CONTESTED CASE HEARING NO. 13061

DECISION AND ORDER

This case is decided pursuant to Chapter 410 of the Texas Workers' Compensation Act and Rules of the Division of Workers' Compensation adopted thereunder.

ISSUES

A spinal contested case hearing was held on February 12, 2013, to decide the following disputed issue:

> Is the preponderance of the evidence contrary to the decision of the IRO neurosurgeon that Claimant is not entitled to a 360 fusion at L5/S1 with bilateral laminectomy and 3 days LOS for the compensable injury of (Date of Injury)?

PARTIES PRESENT

Claimant appeared and was assisted by JF, ombudsman. Carrier appeared and was represented by RJ, attorney.

EVIDENCE PRESENTED

The following witnesses testified:

For Claimant: KJ, M.D.

Claimant

For Carrier: MD, M.D.

The following exhibits were admitted into evidence:

Hearing Officer's Exhibits HO-1 and HO-2

Claimant's Exhibits C-1 through C-14

Carrier's Exhibits CR-A through CR-L

BACKGROUND INFORMATION

Claimant sustained a compensable injury to her low back that resulted in disc pathology at the L5/S1 level that is requiring surgery. Claimant has failed conservative care. Claimant's surgeon, KJ, M.D. requested a 360 fusion at L5/S1 with bilateral laminectomy. This was denied

by the Carrier. The IRO neurosurgeon agreed with the Carrier. Claimant and her doctor have requested this spinal surgery contested case hearing.

Texas Labor Code Section 408.021 provides that an employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed. Health care reasonably required is further defined in Texas Labor Code Section 401.011 (22a) as health care that is clinically appropriate and considered effective for the injured employee's injury and provided in accordance with best practices consistent with evidence-based medicine or, if evidence-based medicine is not available, then generally accepted standards of medical practice recognized in the medical community.

Health care under the Texas Workers' Compensation system must be consistent with evidence-based medicine if that evidence is available. Evidence-based medicine is further defined in Texas Labor Code Section 401.011 (18a) to be the use of the current best quality scientific and medical evidence formulated from credible scientific studies, including peer-reviewed medical literature and other current scientifically based texts and treatment and practice guidelines. The Commissioner of the Division of Workers' Compensation is required to adopt treatment guidelines that are evidence-based, scientifically valid, outcome-focused and designed to reduce excessive or inappropriate medical care while safeguarding necessary medical care. Texas Labor Code Section 413.011(e). Medical services consistent with the medical policies and fee guidelines adopted by the commissioner are presumed reasonable in accordance with Texas Labor Code Section 413.017(1).

In accordance with the above statutory guidance, the Division of Workers' Compensation has adopted treatment guidelines by Division Rule 137.100. This rule directs health care providers to provide treatment in accordance with the current edition of the Official Disability Guidelines, and such treatment is presumed to be health care reasonably required as defined in the Texas Labor Code. Thus, the focus of any health care dispute starts with the health care set out in the Official Disability Guidelines. Also, in accordance with Division Rule 133.308 (t), "A decision issued by an IRO is not considered an agency decision and neither the Department nor the Division are considered parties to an appeal. In a Contested Case Hearing (CCH), the party appealing the IRO decision has the burden of overcoming the decision issued by an IRO by a preponderance of evidence-based medical evidence.

Under the Official Disability Guidelines in reference to a 360 fusion at L5/S1 with bilateral laminectomy and 3 days LOS, the following recommendation is made:

> Patient Selection Criteria for Lumbar Spinal Fusion: For chronic low back problems, fusion should not be considered within the first 6 months 0f symptoms,

except for fracture, dislocation or progressive neurologic loss. Indications for spinal fusion may include:

(1) Neural Arch Defect - Spondylolytic spondylolisthesis, congenital neural arch hypoplasia.
(2) Segmental Instability (objectively demonstrable) - Excessive motion, as in degenerative spondylolisthesis, surgically induced segmental instability and mechanical intervertebral collapse of the motion segment and advanced degenerative changes after surgical discectomy, with relative angular motion greater than 20 degrees. (Andersson, 2000) (Luers, 2007)]
(3) Primary Mechanical Back Pain (i.e., pain aggravated by physical activity)/Functional Spinal Unit Failure/Instability, including one or two level segmental failure with progressive degenerative changes, loss of height, disc loading capability. In cases of workers' compensation, patient outcomes related to fusion may have other confounding variables that may affect overall success of the procedure, which should be considered. There is a lack of support for fusion for mechanical low back pain for subjects with failure to participate effectively in active rehab pre-op, total disability over 6 months, active psych diagnosis, and narcotic dependence. Spinal instability criteria includes lumbar inter-segmental movement of more than 4.5 mm. (Andersson, 2000)
(4) Revision Surgery for failed previous operation(s) if significant functional gains are anticipated. Revision surgery for purposes of pain relief must be approached with extreme caution due to the less than 50% success rate reported in medical literature.
(5) Infection, Tumor, or Deformity of the lumbosacral spine that cause intractable pain, neurological deficit and/or functional disability.
(6) After failure of two discectomies on the same disc, fusion may be an option at the time of the third discectomy, which should also meet the ODG criteria. (See ODG Indications for Surgery -- Discectomy.)

Pre-Operative Surgical Indications Recommended: Pre-operative clinical surgical indications for spinal fusion should include all of the following:

(1) All pain generators are identified and treated; &
(2) All physical medicine and manual therapy interventions are completed; &
(3) X-rays demonstrating spinal instability and/or myelogram, CT-myelogram, or discography (see discography criteria) & MRI demonstrating disc pathology correlated with symptoms and exam findings; &
(4) Spine pathology limited to two levels; &
(5) Psychosocial screen with confounding issues addressed.

(6) For any potential fusion surgery, it is recommended that the injured worker refrain from smoking for at least six weeks prior to surgery and during the period of fusion healing.

(Colorado, 2001) (BlueCross BlueShield, 2002)

For average hospital LOS after criteria are met, see Hospital length of stay (LOS).

Dr. J explained that for the best results Claimant would require a facetectomy and an anterior approach to the vertebrae in order to properly secure the disc space device once the damaged disc was removed. He explained Claimant would have surgically induced instability of the spine once the facetectomy was performed. He explained that given Claimant's overall condition this was the best choice for surgery because the medical literature explains how a 360 fusion has a better rate of recovery and this would eliminate the need for future surgeries if this more extensive surgery was done first.

Carrier's expert, MD, M.D. agreed Claimant needs surgery. He does not dispute Claimant meets the pre-operative surgical indications found in the Official Disability Guidelines. He also agreed the medical literature shows the 360 fusion to be the best approach if a fusion were to be done. The Designated Doctor, while not asked to address treatment, also agrees Claimant needs surgery. However, those doctors opine the 360 fusion is unwarranted at this time and suggest a laminectomy/discectomy since it is the disc and not the facets that is causing the neural foraminal stenosis and impingement on the nerve roots. The IRO doctor states the MRI suggests a possible extruded fragment that could be removed and that this would mean the facet joint disruption caused by a facetectomy and fusion would not be necessary. Dr. D, the Designated Doctor and the URA doctors point out that the radiologists who reviewed the MRI and CT films did not find the stenosis being caused by the facets but it was discogenic.

Both testifying doctors were very instructive and credible. There is no disputing their ability to testify as experts in this matter. In this case, Dr. J and Claimant, as the parties appealing the IRO decision, had the burden by a preponderance of evidence-based medical evidence to establish the requested treatment was medically necessary. Each of the witnesses' testimonies were found to be credible with regard to the mechanism of injury and Claimant's subsequent symptoms. There is no dispute Claimant needs lumbar surgery. However in this case, there was insufficient evidence-based medical evidence explaining how the ODG criteria for the requested fusion was treatment that was medically necessary. As explained by Dr. D, the Official Disability Guidelines would recommend a laminectomy/discectomy before it would recommend the fusion. Without the evidence-based literature or text, Dr. J was not able to overcome the recommendation of the Official Disability Guidelines. The preponderance of the evidence is not contrary to the decision of the IRO neurosurgeon that Petitioner and Claimant are not entitled to a 360 fusion at L5/S1 with bilateral laminectomy and 3 days LOS for the compensable injury of (Date of Injury).

Even though all the evidence presented was not discussed, it was considered. The Findings of Fact and Conclusions of Law are based on all of the evidence presented.

FINDINGS OF FACT

1. The parties stipulated to the following facts:

   A. Venue is proper in the (City) Field Office of the Texas Department of Insurance, Division of Workers' Compensation.

   B. On (Date of Injury), Claimant was the employee of (Employer), Employer.

   C. On (Date of Injury), Claimant sustained a compensable spinal injury.

   D. On (Date of Injury), Employer provided workers' compensation insurance Wausau Underwriters Insurance**,** Carrier.

2. Carrier delivered to Claimant a single document stating the true corporate name of Carrier, and the name and street address of Carrier's registered agent, which document was admitted into evidence as Hearing Officer's Exhibit Number 2.

3. The Independent Review Organization determined that Claimant should not have spinal surgery.

4. A 360 fusion at L5/S1 with bilateral laminectomy and 3 days LOS is not health care reasonably required for the compensable injury of (Date of Injury).

CONCLUSIONS OF LAW

1. The Texas Department of Insurance, Division of Workers' Compensation, has jurisdiction to hear this case.

2. Venue is proper in the (City) Field Office.

3. The preponderance of the evidence is not contrary to the decision of the IRO neurosurgeon that a 360 fusion at L5/S1 with bilateral laminectomy and 3 days LOS is not health care reasonably required for the compensable injury of (Date of Injury).

DECISION

Claimant is not entitled to a 360 fusion at L5/S1 with bilateral laminectomy and 3 days LOS for the compensable injury of (Date of Injury).

ORDER

Carrier is not liable for the benefits at issue in this hearing. Claimant remains entitled to medical benefits for the compensable injury in accordance with §408.021.

The true corporate name of the insurance carrier is **WAUSAU UNDERWRITERS INSURANCE** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TX 78701-3218.

Signed this 14th day of February, 2013.

KEN WROBEL
Hearing Officer